Supreme Court, U.S.
FILED
OCT 25 2004
OFFICE OF THE CLERK

No. 04-410

In The

Supreme Court of the United States

DANIEL BERTRAND,

Petitioner,

v.

THEODORE W. OSWALD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEROME F. BUTING*
Attorney for Respondent
BUTING & WILLIAMS, S.C.
400 N. Executive Drive, #205
Brookfield, Wisconsin 53005
(262) 821-0999; fax (262) 821-5599
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Was the state appellate court's approval of the trial judge's refusal to conduct even a minimally adequate investigation of blatant juror bias and prejudicial conduct in the jury assembly room, when other jurors confirmed to the judge during the voir dire process that such behavior was occurring, an unreasonable application of *Remmer v. United States*, 347 U.S. 227, 230 (1954), which held that due process requires a trial judge to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial," and *Smith v. Phillips*, 455 U.S. 209, 217 (1982), which held that "due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen"?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING REVIEW	7
I. The Seventh Circuit Properly Applied this Court's Clearly Established Law	7
II. The Seventh Circuit Afforded Proper Deference to the State Court Decisions	13
III. The Petition Fails to Satisfy Any of this Court's Criteria for a Grant of Certiorari, and There Are Other Independent Grounds Justifying the Relief Below	17
CONCLUSION	19

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bennett v. Spear, 520 U.S. 154 (1997) 2

Miller-El v. Cockrell, 123 S.Ct. 1029 (2003) 14

Oswald v. Bertrand, 249 F. Supp.2d 1078 (E.D. Wis. 2003) 7

Owen v. Duckworth, 727 F.2d 643 (7th Cir. 1984) 12

Remmer v. United States, 347 U.S. 227 (1954) 8, 13, 18

Rushen v. Spain, 464 U.S. 114 (1983) 12, 13

Sheppard v. Maxwell, 384 U.S. 333 (1966) 13

Smith v. Phillips, 455 U.S. 209 (1982) 8, 10, 12, 18

United States v. Bishawi, 272 F.3d 458 (7th Cir. 2001) 12

Williams v. Taylor, 529 U.S. 362 (2000) 9, 10

Yarborough v. Alvarado, 124 S.Ct. 2140 (2004) 14

FEDERAL STATUTES

28 U.S.C. § 2254(d)(1) 7, 8, 14

28 U.S.C. § 2254(d)(2) 5

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Wisconsin set forth in detail the facts in this case. Pet. App., 24a-37a. The respondent, Theodore Oswald, disagrees with the accuracy of the facts supplied by the Petitioner, and thus relies upon the district court's recitation and the following summary of factual and procedural history in this case.

On April 28, 1994, Ted Oswald and his father, James, were arrested following a police chase from a bank robbery. A police captain was fatally shot and a hostage was taken during the defendants' unsuccessful attempt to flee. A local television news camera crew fortuitously happened upon a police roadblock and broadcast a gun battle with the police, the escape of the hostage and the violent crash of the defendants' getaway vehicle.

The case generated a phenomenal amount of pretrial publicity, both in the immediate aftermath of the sensational live coverage and extensive rebroadcast of the arrest, as well as throughout the months leading up to the trial. The record in the state courts documented some of the pretrial publicity and the effect it manifested on the jury pool. The record revealed that 80% of the jury pool, and 8 of the final 12 jurors, came to court and expressed preconceived opinions that they believed Oswald was guilty. Pet. App., 26a.

Oswald and his father were charged with 19 criminal counts, and later tried separately.

Trial Proceedings

Jury selection in Ted Oswald's case took place over four days. During voir dire the trial court denied defense motions to strike seven jurors for cause. Oswald was forced to utilize all seven of his peremptory strikes in order to remove those jurors from the final panel.[1]

Towards the end of the fourth day of jury selection, it became clear that jurors had been discussing the case while waiting in the jury assembly room. During questioning by the court, Juror Roger Klitzka said that although he had heard or read very little about the case before coming to court, he learned a great deal from his fellow members in the jury assembly room: "I know I've learned more in the last 3 days sitting down there in that room about this case than I have since the day it happened." Pet. App., 5a. He further explained:

> Juror: Well, according to what I hear, the young man is guilty of what he is being accused of and things like that and everything and I just think it's a waste of time.
>
> Court: That it's a waste of time to have a trial at all?
>
> Juror: Yes.

Id. Defense counsel asked the court to strike Klitzka for cause or require that he describe in more detail what he

---

[1] Three of those jurors later formed the basis of one of Oswald's issues on appeal, and the federal district court's grant of habeas relief. Pet. App., 66a-83a. The Seventh Circuit did not reach this issue because it affirmed on the trial court's refusal to investigate juror bias. Oswald asserts that the Seventh Circuit's affirmance is also justified on this alternative ground. *Bennett v. Spear*, 520 U.S. 154, 166-67 (1997).

heard. The district attorney opposed both requests, arguing such questions were "none of [defense counsel's] business," and that further questioning would be "intruding into his privacy." Pet. App., 29a. The court refused to either strike the juror for cause or require him to answer further questions about the information he was receiving in the jury assembly room.

Defense counsel then asked the court to inquire of the jurors who had already been qualified what type of information was being spread in the jury room. The court refused counsel's request and instead limited inquiry to questioning of the few remaining jurors who had not yet been examined. Pet. App., 6a. The very next juror (Susan Beers) corroborated Klitzka's testimony that throughout the four days of jury selection, other jurors in the assembly room had expressed their preconceived opinions of guilt: "they will just say it's guilty, you know, right off the top of their head." Pet. App., 31a. Defense counsel renewed his request to re-question Klitzka or the other jurors Pet. App., 32a. The court denied the request, but did go to the jury assembly room over the lunch break to re-instruct the jurors not to discuss the case. At that point one of the jurors, William Schuenke, spoke up to the judge and said: "I really want to talk to you. I had written that letter. It's really important. I don't want to – I'm part of the 29 [i.e., the pool from which peremptories would be exercised]." Pet. App., 7a.

After the lunch recess the court disclosed that it had received four letters from jurors asking to be excused. One of them was Schuenke, who wrote the judge: "I will more than likely be so concerned about my work that I'd not give the trial all the attention it should receive to the point I might just vote either way to end it." *Id.* Defense counsel

asked the court to excuse Schuenke or at least permit further questioning about his letter. *Id.* Counsel explained that the court had already denied seven defense strikes for cause and he intended to use all of his allotted peremptory challenges to remove those seven, thus leaving none to use against Schuenke, who said he might not decide the case on the evidence. Pet. App., 34a. The court refused to remove Schuenke for cause or permit further questioning. *Id.*

Another juror (George Schroeder) also wrote a letter advising the court that although in his voir dire he had promised to set aside his opinions, he now believed Oswald was guilty and he could not be unbiased. *Id.* The court denied defense counsel's request to inquire of Schroeder whether he had changed his mind because of communications from other jurors in the assembly room. *Id.*

When the court later advised the pool of jurors that all requests to be excused had been considered, Schuenke spoke up in front of the others: "I asked to speak to you two days ago. You mean I can't get five minutes of your time?" Pet. App., 7a. The court explained to Schuenke all requests had been addressed, to which Schuenke replied: "Not to me they weren't you know." *Id.* Schuenke served on the jury throughout the trial and verdict because the defense had used all their peremptory challenges on the jurors whom the judge refused to strike for cause. *Id.*

At Oswald's trial, his attorney presented the defense of coercion, arguing that his client had been subjected to years of psychological abuse to such a degree that he was coerced into following his father's instructions to commit the charged crimes. The jury rejected the coercion defense and convicted on all counts.

Post Conviction Proceedings

A post conviction motion was filed and a hearing was conducted which adduced testimony from one of the prospective jurors, Jaqueline Mihm, about the conduct of jurors in the waiting room during the four days of voir dire. Mihm's testimony corroborated the testimony of Klitzka and Beers that numerous jurors in the assembly room were discussing their opinions that Oswald was guilty. She testified that she observed three men repeatedly expressing their opinions that Oswald was guilty and the trial was a sham, a joke, and a waste of time. Pet. App., 35a-36a. Mihm was later removed from the jury pool during the exercise of peremptory challenges, but returned to watch some of the trial. Mihm testified that one of the jurors she heard stating that the trial was a waste of time and Oswald was guilty was sitting on the final panel. *Id.* Mihm's testimony indirectly identified this juror as William Schuenke. Pet. App., 36a.

The state trial court judge rejected Mihm's testimony as unreliable, a conclusion the federal district court found to be an "unreasonable determination of the facts in light of the evidence presented," Pet. App., 57a, citing 28 U.S.C. § 2254(d)(2), primarily because nearly all of Mihm's testimony was corroborated by other evidence, including the jurors who spoke up about the misconduct on the fourth day of jury selection. Pet. App., 59a. The state court of appeals assumed the truthfulness of Mihm's testimony, but held that Schuenke's comments in the jury assembly room did not demonstrate bias, a conclusion the district court found even more unreasonable. Pet. App., 60a. ("A juror who believes that a defendant's guilt is so firmly established that it is unnecessary to hold a trial cannot reasonably be said to be open to any defense.")

The Seventh Circuit did not decide Oswald's claim that Schuenke's presence on the final jury panel deprived him of his right to due process and an impartial jury. That, too, is another alternative ground on which the grant of habeas relief could be affirmed.

Testimony was also taken at the post conviction hearing from defense counsel on the question of ineffective assistance of counsel. Oswald argued that his attorney was ineffective for failing to advance a potentially complimentary defense of not guilty by reason of mental disease or defect. After his conviction Oswald learned that a Minnesota psychologist, Dr. James Gilbertson, who his attorney presented at trial to support the psychological coercion defense, would also have supported an insanity defense, had defense counsel ever provided him with the legal standard applicable in Wisconsin for such a defense. Pet. App., 118a. Oswald's trial attorney acknowledged at the post conviction hearing that he failed to advise his expert of the law in Wisconsin, but felt justified in doing so because he had himself rejected such a defense. *Id.* But Oswald was never told that his lawyer had already employed an expert who could have supported both a psychological coercion and an insanity defense.[2]

The trial court denied all post conviction motions and was affirmed by the Wisconsin court of appeals. Following a denial of review by the state supreme court, Oswald sought federal habeas corpus relief. The district court granted Oswald's petition on the grounds of juror bias and

[2] The ineffective assistance of counsel claim was also raised throughout the federal habeas proceedings, but was never addressed by either court in their decisions.

misconduct and the trial court's failure to adequately investigate such claims when they arose. *Oswald v. Bertrand*, 249 F. Supp.2d 1078, 1097, 1100 (E.D. Wis. 2003) (also found at Pet. App., 23a-84a). The district court also found that the state courts violated Oswald's due process rights by arbitrarily depriving him of state statutory rights to which he was entitled. *Id.* at 1110-11. Because the court granted relief on those grounds, it did not reach the ineffective assistance claim. *Id.*

The State appealed to the Seventh Circuit, which affirmed, in a decision authored by Judge Richard Posner. The State then filed a petition for rehearing and a petition for rehearing *en banc*, which was denied. All three members of the original panel, including the dissenting judge, voted to deny rehearing. No judge in active service requested a vote on the *en banc* decision. The State's petition for review in this Court follows.

REASONS FOR DENYING REVIEW

I. The Seventh Circuit Properly Applied this Court's Clearly Established Law.

The State struggles to fashion an argument that would warrant the involvement of this Court. In its endeavor to find a question worthy of review the State suggests:

> Certiorari is necessary to clarify that, under 28 U.S.C. § 2254(d)(1), a federal court may not distill principles from the court of appeals' interpretation of this Court's holdings or rely upon quoted material which does not figure in this Court's holding in order to assess whether a state court decision is objectively unreasonable.

Pet., at 11. However, "clarification" of these points is neither necessary in general nor required by the decision in this case. The State mischaracterizes the Seventh Circuit's ruling, which neither breaks precedent nor plows new ground. The court carefully identified the nature of Oswald's claim and then simply applied the principles long established by this Court.

The Seventh Circuit decision, authored by Judge Posner, began by noting that a state criminal defendant has a due process right to an impartial jury, and then, citing this Court's precedent, noted that "[i]n addition – and this is critical – the clause requires the trial judge, if he becomes aware of a possible source of bias, to 'determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial.' *Remmer v. United States*, 347 U.S. 227, 230 (1954)." Pet. App., 2a. Judge Posner further explicated the relevant Supreme Court law:

> In *Smith v. Phillips*, 455 U.S. 209, 217 (1982), the Supreme Court put the two points together, saying that "due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and *to determine the effect of such occurrences when they happen*."

Id. at 3a (emphasis added). It was these principles that the Seventh Circuit correctly considered as "clearly established federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The State argues in this Court that the language from *Smith* as to the timing of the trial court's investigation of prejudicial occurrences is mere *dicta*, and thus not "clearly established federal law" determined by this Court. The State further argues that none of this Court's cases hold

that an immediate investigation into juror bias is necessary to satisfy due process. Pet., at 8-9. In the State's view, it was not necessary for the trial court to investigate immediately when it learned that jurors were discussing the case for four days in the waiting room and concluding, even before the trial began, that Oswald was guilty and the trial a waste of time, because the United States Supreme Court has never specifically required this procedure. This same argument was properly rejected by the Seventh Circuit.

Stringent as the standard contained in § 2254 may be, it does not demand this type of superficial and hypertechnical interpretation. The fact that this Court has not addressed a fact situation identical to this one and concluded specifically that such facts demand a reexamination of the previously questioned jurors does not preclude a federal court from concluding that the trial court's gross failure to investigate and the court of appeals' perfunctory decision condoning it were contrary to and unreasonable applications of clearly established federal law.

For example, in *Williams v. Taylor*, 529 U.S. 362, 391 (2000), this Court held:

> It is past question that the rule set forth in *Strickland* qualifies as "clearly established federal law as determined by the Supreme Court of the United States." That the *Strickland* test "of necessity requires a case by case examination of the evidence" obviates neither the clarity of the rule nor the extent to which the rule must be seen as "established" by this Court.

Id. (citations omitted). In *Williams*, this Court found that the state court unreasonably applied the rule of *Strickland* to conclude that trial counsel's deficient failure to present

mitigating evidence at sentencing did not prejudice the defendant. *Williams*, 529 U.S. 395-96. There was no requirement that the petitioner identify a United States Supreme Court case in which trial counsel failed to present mitigating evidence at sentencing. It was enough that the state court had ruled contrary to and misapplied the clearly established general rule of *Strickland*.

Likewise, prejudicial occurrences may develop in many different ways during jury selection, but it is no less clearly established that a court must be "ever watchful" to "determine the effect of such occurrences when they happen." *Smith*, 455 U.S. at 217. That is all the Seventh Circuit held in this case. The court found that the trial judge "flunked the constitutional test" by failing to undertake a diligent inquiry when the evidence and circumstances clearly suggested that some, and maybe all, of the jurors were biased against Oswald. Pet. App., 8a-9a.

When Klitzka revealed that prospective jurors had been conducting "marathon bull sessions on Oswald's guilt," an alarm bell should have gone off for both counsel and the court. Defense counsel rightly feared that the entire pool of prospective jurors was being poisoned and pleaded with the court to question Klitzka further and to re-examine those jurors who had already been qualified. But the prosecutor (who the Seventh Circuit observed "made every possible effort to prevent the judge's determining whether jurors were biased," Pet. App., 5a) objected to such further inquiry. Even though the circumstances strongly suggested that the jury had made up its mind on Oswald's guilt, and felt that the trial was a waste of time, the trial judge refused to question Klitzka further or recall any of the earlier questioned jurors. In

the context of all the other circumstances described by the court, *see* Pet. App., 8a, the Seventh Circuit correctly held that the trial judge failed the admonition of this Court that a judge must be "ever watchful" for prejudicial occurrences and "determine the effect of such occurrences when they happen."

The State faults the court for saying that it "distilled" from the caselaw the proposition that the greater the probability of bias, the more searching the inquiry must be to insure an unbiased jury is impaneled. The State objects because "this Court has never announced this principle." Pet., at 9. But the Seventh Circuit simply described a common sense proposition, not a new rule of law. AEDPA does not preclude the circuit courts of appeal from stating the obvious. The "clearly established federal law" at issue is the duty of a trial judge to be "ever watchful" for prejudicial occurrences and to conduct an investigation reasonably tailored to determine the effect of such occurrences when they happen.

The trial court's feeble inquiry into juror bias in the waiting room was wholly inadequate. As Judge Posner noted, the trial court's decision to simply remind the jurors not to discuss the case after they had been discussing it for four days "was a case of closing the barn door after the horse had escaped." Pet. App., 8a.

The State further argued in the Seventh Circuit, as it does here, that Oswald had a postconviction hearing which satisfied his right to due process. The Seventh Circuit deemed that argument waived by the State's inadequate briefing. Pet. App., 13a. Nevertheless, the court ruled that even if the issue had been preserved, the postconviction hearing did not satisfy Oswald's constitutional rights. *Id.* Judge Posner observed:

> When the issue of jury bias does not arise until after trial and conviction, the trial judge cannot be faulted for having failed to investigate it, and a postconviction hearing is an inevitable and authorized substitute. *Rushen v. Spain*, 464 U.S. 114, 119 (1983) (per curiam); *Smith v. Phillips*, *supra*, 455 U.S. at 215-18; *id.* at 221-24 (concurring opinion); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984) (per curiam); *Fitzgerald v. Greene*, 150 F.3d 357, 364-65 (4th Cir. 1998); cf. *United States v. Bishawi*, 272 F.3d 458, 462-63 (7th Cir. 2001). But as *Dyer v. Calderon*, from which we quoted earlier, makes clear, if the issue does surface during, or in this case before, trial, it is the trial judge's responsibility to conduct an adequate investigation, given the unsatisfactory character of an inquiry into jury bias after the trial is over and the defendant convicted. Compare *United States v. Bradshaw*, *supra*, 281 F.3d at 289-93; *United States v. Angiulo*, *supra*, 897 F.2d at 1183-86. Having invested time in the trial and voted to convict the defendant, jurors are unlikely to acknowledge bias, or even to remember the particulars of the discussions that they had had of the case before it was tried – their recollections are likely to be overshadowed by what they learned about the case during the trial. That is why cases such as *Bradshaw* and *Angiulo* stress the importance of a prompt determination, by the trial judge, at the jury selection stage. Obviously if the problem arises or is discovered later, it must be dealt with later; that is all that cases like *Rushen* allow.

Pet. App., 13a-14a.

This Court has emphasized the importance of dealing with juror bias the moment it appears, when the trial

court is still in a position to do something about it. *See, Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (court must take steps to prevent prejudicial outside interference at its inception); *Rushen v. Spain*, 464 U.S. 114, 128, n. 6 (1983) (Stevens, J., concurring) (meaningful time to resolve doubts about juror impartiality is when problem can be remedied by replacing the juror).

The Seventh Circuit also correctly held that the state appeals court's perfunctory decision condoning the woeful performance by the trial judge was an unreasonable application of this Court's rulings in *Smith* and *Remmer*. The state appellate court gave no reason for its decision approving the trial court's handling of the jury selection process, other than its "naked conclusion that the judge had done enough." Pet. App., 13a. The state court of appeals never even mentioned this Court's decisions in *Smith* and *Remmer*, and utterly ignored the due process duty of a trial judge to be vigilant to discover and remedy prejudice.

Thus, the Seventh Circuit correctly held that the state court decisions were unreasonable applications of the law and were contrary to the fundamental principles of due process and the Sixth Amendment explicated in such cases as *Smith*. It is "past question" that those principles, like the rule of *Strickland*, constitute "clearly established federal law as determined by the Supreme Court of the United States."

II. The Seventh Circuit Afforded Proper Deference to the State Court Decisions.

The State also argues that the Seventh Circuit decision fails to afford the appropriate deference to the state

court required by 28 U.S.C. § 2254(d)(1). Pet., at 13. Apparently, in the State's view, a federal court must defer to a state court's decision to conduct only a nominal investigation, however inadequate it is in relation to the evidence of juror bias. But even in the context of federal habeas corpus, "deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 123 S.Ct. 1029, 1041 (2003).

This Court's decision in *Yarborough v. Alvarado*, 124 S.Ct. 2140 (2004), adds nothing new to this equation. The State admits that certain facts support the Seventh Circuit's decision, but argues that because others point in the other direction, the federal court must defer to the state courts' decisions. Pet., at 16. But, unlike the question of custody in *Yarborough*, this is not a case where it was a close question on whether the state courts' application of federal law was unreasonable. Therefore, contrary to the State's assertion, this Court's precedents do not demand such a "substantial element of judgment," Pet., at 16, that the state court decisions are insulated from review by a federal court.

The evidence revealed that some, maybe all, of the jurors were biased against Oswald before they heard a shred of evidence. The Seventh Circuit summarized the circumstances:

> The response to the jury questionnaires against the background of enormous publicity concerning the most sensational criminal episode in the county's history, the fact that Oswald seemed so obviously guilty as to make the necessity for a trial questionable to a layperson, the tumult induced by Schuenke's vocal complaints, the flagrant disobedience of the judge's instructions

> that the prospective jurors not discuss the case in advance of the trial, the likelihood that Schuenke and perhaps other reluctant jurors would vote to convict regardless of their actual views if that would make the trial end quicker, the fact that, at least according to Klitzka, the improper discussions had already produced a consensus that Oswald was guilty as charged – *all* these things, taken not separately but together, created a sufficiently high probability of jury bias to require on the part of the trial judge a diligent inquiry.

Pet. App., 8a.

Against these facts, the Seventh Circuit noted that the state appellate court gave no reasons justifying its approval of the trial court's lack of a minimally timely, minimally adequate investigation:

> It is not as if the state appellate court had given reasons for its decision that, even if we did not find them persuasive, we could not pronounce unreasonable. A state court can of course be wrong without being unreasonable, and the reasonableness of a decision ordinarily cannot be assessed without considering the quality of the court's reasoning.
>
> As far as the narrative of the jury selection process is concerned, the accuracy of which is not in question, the state appellate court said *nothing* beyond the naked conclusion that the judge had done enough.

Pet. App., 12a-13a. Requiring a federal court's deference to such a state court decision would amount to "abandonment or abdication of judicial review."

The State further argues that the woefully inadequate inquiry into juror bias was justified because of the defendant's coercion defense, which did not contest his presence and involvement in the crimes. But, as the district court recognized, "nothing in the record indicates that [Oswald] wanted jurors who made or were influenced by statements by other jurors that he was guilty and the trial a waste of time." Pet. App., 52a. No matter how strong the evidence or type of defense offered, a defendant is entitled to an impartial jury. Judge Posner states this point well:

> Oswald was entitled to be tried by a jury that undertook to decide his guilt on the basis of the evidence rather than of what they had learned from the pretrial publicity about the case and analyzed over a four-day period while waiting for the trial to begin. It was natural that having seen the videotape of Oswald's crimes, laypersons would assume his guilt was open and shut. But a jury that decides guilt before the trial begins is little better than a lynch mob.

Pet. App., 12a.

The Seventh Circuit properly considered all relevant information and points of law in concluding that the district court's grant of habeas relief was appropriate. The federal courts did not simply second guess the state courts' judgment. The Seventh Circuit afforded whatever deference the state court decisions were entitled, yet rightly found them to be unreasonable.

III. The Petition Fails to Satisfy Any of this Court's Criteria for a Grant of Certiorari, and There Are Other Independent Grounds Justifying the Relief Below.

The State does not allege that the Seventh Circuit decision conflicts with other federal circuits. Review is thus not necessary to resolve any conflicts among the circuits.

Neither is review appropriate to resolve an important issue likely to affect many other litigants. The facts of this case are so peculiar, and the juror bias so extreme, that it is not likely the Seventh Circuit decision will apply to many future cases in any circuit. Indeed, the State's own petition admits this was a very unusual case, with peculiar facts, a very rarely used psychological coercion defense and the extremely unlikely happenstance of a live television broadcast of a shootout and capture of fugitives. Pet., at 13.

It is certainly not the usual case where a judge discovers in the middle of voir dire that jurors are telling each other outside of court that the trial is a "joke", a "sham" and "a waste of time." It should be obvious to any reasonable judge that such comments do not indicate any degree of willingness to give the defense a fair shake, and that a careful investigation was necessary to ferret out jurors holding such beliefs. As the district court noted: "[a] juror who believes that a defendant's guilt is so firmly established that it is unnecessary to hold a trial cannot reasonably be said to be open to any defense." Pet. App., 61a. The record in this case established that one of the jurors who made such comments did so even after he had assured the court in individual voir dire that he could be fair, and that the same juror actually served on the jury that convicted Oswald. Pet. App., 60a-61a.

The factbound decision of the Seventh Circuit simply applied well settled law, described in *Remmer* and *Smith*, to the very unusual facts in this case. Had the trial court in this case applied common safeguards and procedures to insure that only unbiased jurors sat in judgment, this case would not now be before this Court. One would expect that most judges would be more careful to be vigilant to the possibilities of prejudicial occurrences and that the unusual facts in this case are unlikely to recur with any frequency.

Finally, even the dissenting judge in the Seventh Circuit did not deem this case worthy of panel or *en banc* rehearing. For this reason alone, certiorari should be denied. But in any event, other meritorious arguments show the decision below to be correct without regard to the question sought to be raised by the State in its petition.

As noted earlier, the district court granted habeas relief on two additional grounds not reached by the Seventh Circuit. Each alone would require issuance of the writ, but together they reinforce the decision. Besides the trial court's failure to adequately investigate the shenanigans that were going on in the jury assembly room, the district court also granted relief because a biased juror actually sat on Oswald's jury. Pet. App., 55a-62a. In addition, the district court also granted habeas relief because the state court decisions arbitrarily deprived Oswald of his state rights related to jury selection. Pet. App., 63a-83a. Furthermore, Oswald submits that a fourth claim, ineffective assistance of counsel, fully preserved and briefed in the federal courts but never ruled upon, would also support a writ of habeas corpus. Review by this Court is therefore unwarranted.

CONCLUSION

For the reasons set forth above, the State has not articulated any compelling reason to justify this Court's discretionary review. Oswald respectfully requests that this Court deny the State's Petition for Writ of Certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Dated this 25th day of October, 2004.

Respectfully submitted,

JEROME F. BUTING*
Attorney for Respondent
BUTING & WILLIAMS, S.C.
400 N. Executive Drive, #205
Brookfield, Wisconsin 53005
(262) 821-0999; fax (262) 821-5599
**Counsel of Record*